TENAGA NASIONAL BHD

v.

PERWAJA STEEL SDN BHD

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
AHMAD FAIRUZ JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: W-02-619-1995]
16 FEBRUARY 1998

CONTRACT: *Agreement to supply electricity - Discount - Further discount given by Ministry - Subsequent withdrawal of discount by Ministry - Electiricity bills still reflected discounted rate notwithstanding withdrawal of discount - Estoppel - Whether failure to bill correctly amounted to estoppel*

This was an appeal by the appellant against the decision of the High Court dismissing its claim against the respondent for the repayment of a 20% discount on electricity bills wrongly given to the respondent.

The appellant *via* a contract, had since 1985 supplied electricity to the respondent at a special discount of 30% ('the 30% discount'). By a letter dated 11 March 1987, the respondent was given an additional discount of 20% ('the 20% discount') by the Ministry of Trade and Industry ('the Ministry') to have taken effect from 1 February 1987 as an incentive to new industries but this was subjected to certain conditions being fulfilled ('the conditions'). Based on these discounts, the appellant had sent monthly electricity bills to the respondent with credit notes for the 30% discount and the 20% discount and also covering letters confirming the discounts and that the respondent only had to pay the net amounts under the electricity bills.

The 20% discount was subsequently withdrawn by the Ministry when the respondent failed to meet the conditions but the appellant was informed of this withdrawal only on 29 August 1990. Meantime, the appellant had continued to allow the respondent to enjoy the 20% discount from February 1988 until August 1990. After receiving the notice of withdrawal, the appellant then demanded from the respondent the repayment of the 20% discount claimed to be wrongly given for the period from February 1988 to December 1990. The respondent agreed to the repayment from January 1990 till December 1990 but refused to make any repayment for the period from February 1988 to December 1989.

The issue in this appeal was the effective date of the withdrawal of the 20% discount.

Held:
Per Ahmad Fairuz & Mokhtar Sidin JJCA

[1] The appellant had issued monthly credit notes duly signed and authenticated by its authorised officers and had accepted the payments of the monthly bills from the respondent for the period in dispute without raising any objection to the payments or imposing any conditions. By doing so, the respondent was induced into accepting the 50% discount given as per advice in the credit notes as valid, unconditional and irrevocable and that the payments made by the respondent in respect of those bills were the full and final settlement of those bills. The appellant was therefore estopped from contending that the credit notes for the 30% and 20% discounts issued together with the bills were not valid.

[2] It was the obligation and the legal duty of the appellant to send the correct electricity bills to the respondent. At all material times the appellant ought to know that the respondent would rely upon those bills and credit notes, which were signed by authorised officers of the appellant and were properly issued, to make the payments.

[3] There was no evidence to show that the respondent prior to 1 January 1990 knew of the withdrawal of the 20% discount given to it.

[4] Pursuant to s. 101 of the Evidence Act 1950 the onus was on the appellant to prove that they were entitled to their claim. The burden was on the appellant and it was their duty to prove their claim affirmatively. The appellant had failed to do so.

[5] Based on the evidence available, it was clear that the withdrawal of the 20% discount by the Ministry was effective only from 1 January 1990.

[Appeal dismissed with costs.]

a *[**Bahasa Malaysia** Translation of Headnotes]*

Ini adalah rayuan oleh perayu terhadap keputusan Mahkamah Tinggi yang menolak tuntutannya terhadap responden untuk pembayaran balik diskaun sebanyak 20% ke atas bil-bil eletriknya yang telah diberikan secara salah kepada responden.

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Perayu melalui satu kontrak, telah sejak 1985 membekalkan elektrik kepada responden pada harga diskaun khas sebanyak 30% ('diskaun 30 tersebut'). Melalui surat bertarihk 11 Mac 1987, responden telah diberikan diskaun tambahan sebanyak 20% ('diskaun 20% tersebut') oleh Kementerian
c Perdagangan dan Perindustrian ('Kementerian tersebut') yang berkuatkuasa daripada 1 Februari 1987 sebagai suatu galakan kepada industri-industri baru tetapi perkara ini adalah tertakluk kepada syarat-syarat tertentu dipenuhi ('syarat-syarat tersebut'). Berdasarkan diskaun-diskaun ini, perayu telah mengirimkan bil-bil eletrik bulanan kepada responden dengan nota-nota kredit
d bagi 30% diskaun dan 20% diskaun dan juga surat-surat iringan yang mengesahkan bahawa diskaun-diskaun tersebut telah ditolak dan responden hanya perlu membayar jumlah bersih pada bil-bil elektrik tersebut.

Diskaun 20% tersebut telah kemudiannya ditarik balik oleh Kementerian apabila responden gagal untuk memenuhi syarat-syarat tersebut tetapi perayu
e telah hanya dimaklumkan mengenai penarikan balik ini pada 29 Ogos 1990. Sementara itu, perayu telah terus membenarkan responden menikmati diskaun 20% tersebut daripada Februari 1988 sehingga Ogos 1990. Selepas menerima notis penarikan balik tersebut, perayu telah menuntut daripada responden pembayaran balik diskaun 20% tersebut yang dituntut telah diberikan secara
f salah bagi tempoh Februari 1988 hingga Disember 1990. Responden tersebut bersetuju kepada pembayaran balik daripada bulan Februari 1988 hingga bulan Disember 1990 tetapi enggan untuk membuat pembayaran balik bagi tempoh daripada bulan Februari 1988 hingga Disember 1989.

Isu dalam rayuan ini adalah tarikh penguatkuasaan penarikan balik diskaun
g 20% tersebut.

Diputuskan:
Oleh Ahmad Fairuz & Mokhtar Sidin HHMR

h **[1]** Perayu telah mengeluarkan nota-nota kredit bulanan yang telah ditandatangan dan disahkan oleh pegawai-pegawainya yang sah dan telah menerima pembayaran bil-bil bulanan tersebut daripada responden bagi tempoh yang dipertikaikan tanpa membangkitkan sebarang bantahan kepada pembayaran-pembayaran tersebut atau pengenaan sebarang syarat. Dengan melakukan sedemikian, responden telah didorong untuk menerima 50%

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diskaun yang telah diberikan menurut penyata dalam nota-nota kredit tersebut sebagai sah, tidak bersyarat dan tidak boleh batal dan bahawa pembayaran-pembayaran yang dibuat oleh responden berhubung dengan bil-bil itu merupakan penjelasan penuh dan muktamad bil-bil tersebut. Perayu dengan itu diestop daripada menegaskan bahawa nota-nota kredit bagi diskaun-diskaun sebanyak 20% dan 30% yang dikeluarkan bersama-sama dengan bil-bil tersebut adalah tidak sah.

[2] Ianya adalah merupakan kewajipan dan tugas sah perayu untuk mengirimkan bil-bil eletrik yang betul kepada responden. Pada setiap waktu yang material perayu seharusnya mengetahui bahawa responden akan bergantung pada bil-bil dan nota-nota kredit tersebut, yang telah ditandatangani oleh pegawai-pegawai perayu yang diberi kuasa dan telah dikeluarkan dengan sewajarnya, untuk membuat pembayaran-pembayaran tersebut.

[3] Tidak terdapat keterangan yang menunjukkan bahawa responden sebelum 1 Januari 1990 telah mengetahui mengenai penarikan balik diskaun sebanyak 20% tersebut yang telah diberikan kepadanya.

[4] Selaras dengan s. 101 Akta Keterangan 1950 bebanan adalah terletak pada perayu untuk membuktikan bahawa mereka adalah berhak kepada tuntutan mereka. Bebanan adalah terletak pada perayu dan ianya merupakan tugasnya untuk membuktikan tuntutannya secara tegasnya. Perayu telah gagal untuk membuat sedemikian.

[5] Berdasarkan keterangan yang ada, ianya adalah jelas bahawa penarikan balik diskaun sebanyak 20% oleh Kementerian adalah berkuatkuasa hanya pada 1 Januari 1990.

[Rayuan ditolak dengan kos.]

Legislation referred to:
Evidence Act 1950, s. 101

For the appellant - Muhammad Nur Azmi Hashim (Goh Peng Hong with him); M/s Bakar & Partners
For the respondent - VK Lingam (Shauna Madhavan with him); M/s VK Lingam

[Appeal from High Court, Kuala Lumpur; Suit No: D2-22-1037 of 1992]

Reported by Ling Hea Hoon

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JUDGMENT

Shaik Daud Ismail JCA:

I have had the advantage of reading in draft the judgments of both YA Datuk Haji Mokhtar bin Haji Sidin and Dato' Ahmad Fairuz bin Dato' Shaik Abdul b Halim and I concur with them.

Ahmad Fairuz JCA:

Pada masa-masa yang material, perayu, Tenaga Nasional Berhad, telah membekalkan dan responden, Perwaja Steel Sdn. Bhd, telah menggunakan c aliran elektrik di premis perindustrian responden di Kemamam, Terengganu. Bagi penggunaan itu responden telah, antara lainnya, diberi potongan atau diskaun 20% (selepas ini disebut "diskaun itu") atas bil-bil elektrik bulanannya. Diskaun itu, yang diberi mulai 1 Februari 1987, adalah atas ehsan dan arahan Kementerian Perdagangan dan Perindustrian Malaysia.

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Pada 29 Ogos 1990, perayu telah dimaklumkan oleh Kementerian Perdagangan dan Perindustrian Malaysia bahawa diskaun itu ditarik-balik mulai 1 Februari 1988. Oleh demikian perayu menuntut agar responden memulangkan jumlah diskaun itu – iaitu yang telah diberi kepada responden dari bulan Februari 1988. Kerana responden hanya mengembalikan amaun-amaun diskaun itu bagi e bulan-bulan Januari hingga Ogos 1990, perayu menuntut responden membayar balik amaun-amaun diskaun itu bagi bulan-bulan Februari 1988 hingga Disember 1989.

Dalam penghujjahannya, peguam terpelajar perayu menarik perhatian f mahkamah ini kepada ms 182-185 Rekod Rayuan yang menunjukkan dokumen-dokumen yang diberikan oleh perayu kepada responden pada tiap-tiap bulan. Antara dokumen-dokumen itu ialah dokumen mengenai diskaun itu. Diakui oleh perayu bahawa dokumen mengenai diskaun itu diberi kepada responden mulai 1 Februari 1987 hingga 31 Disember 1989. Perayu hanya menghentikan g pengeluaran dokumen itu mulai 1 Januari 1990.

Berasaskan dokumen-dokumen tersebut dalam perenggan 3 di atas, responden telah membuat pembayaran-pembayaran sewajarnya kepada perayu. Dengan lain perkataan responden membayar bil-bil mengenai penggunaan elektrik itu setelah ditolak, antara lainnya, diskaun-diskaun itu. Malah diskaun itu bersama-sama h dengan kos-kos yang ditanggungi oleh responden dalam mengeluarkan keluli-kelulinya (steelbilets) telah diambilkira oleh pihak kerajaan semasa meluluskan harga keluli-keluli yang dibuat oleh responden.

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Berlatarbelakangkan keadaan-keadaan yang digambarkan oleh perenggan-perenggan di atas, amat ketara sekalilah bagaimana tak saksamanya (inequitable) jika responden diperlukan mengembalikan amaun-amaun diskaun itu kepada perayu seperti dituntutnya. Kepincangan kesaksamaan ini amat terserlah jika diteliti dari pendekatan diskaun itu juga telah digunakan sebagai kayu pengukur penentu harga keluli-keluli responden. Dan keluli-keluli buatan responden itu telahpun dijual dengan harga-harga yang diluluskan oleh kerajaan. Barang diingat juga bahawa surat-surat daripada perayu sendiri memaklumkan responden yang diskaun itu ditarik balik mulai 1 Januari 1990 dan surat-surat itu masing-masingnya bertarikh 24 Julai 1990 dan 27 Ogos 1990. Maka kerana itulah responden telah membayar balik amaun-amaun diskaun itu bagi bulan-bulan Januari hingga Ogos 1990. Dan tindakan responden itu tidaklah ternafi kewajarannya jika dilihat dari sudut perayu telah diestop daripada menuntut amaun-amaun bagi bulan-bulan Februari 1988 hingga Disember 1989. Alasan-alasan penghakiman Yang Arif Hakim Mahkamah Tinggi dalam hal estoppel ini adalah kena pada tempatnya.

Atas sebab-sebab tersebut dalam perenggan-perenggan sebelum ini nyatalah bahawa penghakiman Yang Arif Hakim Mahkamah Tinggi amat sukar sekali untuk digangggugugatkan. Oleh kerana tiada terdapat sebarang kesalahan atau kesalaharahan di pihak Yang Arif Hakim Mahkamah Tinggi, saya bersetuju supaya rayuan ini ditolak dengan kos dan mengarahkan deposit digunakan untuk kos tercukai.

Mokhtar Sidin JCA:

This is an appeal by the plaintiff (hereinafter referred to as the appellant) against the decision of the learned judge who had in the High Court dismissed the claim by the appellant against the respondent. The claim by the appellant was for the sum of RM13,127,331.79 together with interest.

In its statement of claim the appellant stated that at the request of the respondent, the appellant through Contract No. 383/85 supplied to the respondent's industrial premises at Kawasan Perusahaan Telok Kalong, Kemaman, Terengganu the electricity supply which was connected on 3 September 1984. Payments of the electricity bill was made under Account No. 0441/6001130010. It was the appellant's policy to give a special discount of 30% to specific clients of which the respondent was one of them. The respondent was given an additional discount of 20% by the Kementerian Perdagangan dan Perindustrian with the consent of the Kementerian Tenaga, Telekom dan Pos which was as incentive to new industry but it was subjected to certain conditions. Taking the two discounts into consideration the respondent was entitled to a 50% discount on any of its electricity bill. It is to be noted that the letter from the Kementerian Perdagangan dan

Perindustrian giving the 20% discount was dated 11 March 1987 and that the discount was to take effect from 1 February 1987. The same letter also requested the respondent to contact the appellant's local branch at the place where the premises was situated in order to get the discount.

Based on the above, the appellant sent the monthly electricity bills to the respondent with the credit notes for the 30% discount and the 20% discount and also covering letters, confirming the amounts under the electricity bills. The bills showed that the amount of 30% discount and 20% discount had been deducted and what were the nett amounts to be paid by the respondent. According to the record of the appellant the discount of 30% had always been given to the respondent and was never withdrawn and the respondent had paid only 70% of the total amount billed. As such there is no dispute in respect of this 30% discount given by the appellant to the respondent.

The issue in respect of this appeal is the dispute on the 20% discount given by the Kementerian Perdagangan dan Perindustrian which was purportedly withdrawn. There is no dispute that the 20% discount was subsequently withdrawn. The question before us was when was the effective date of the withdrawal. This is important because this will determine the issue whether the appellant is entitled to the claim. To me the whole appeal is a question of fact. It is pertinent to note that the withdrawal of the 20% discount given by the Kementerian to the respondent was that the respondent failed to meet the condition that its electricity bill did not exceed 20% of the total cost of production by the respondent. The appellant was informed of this withdrawal only on 29 August 1990.

The appellant claimed that because of the delay in receiving the notice of the withdrawal of the discount from the Kementerian, the respondent continued to enjoy the discount of 20% from February 1988 until August 1990. After receiving the notice the appellant demanded from the respondent for the repayment of the 20% discount claimed to be wrongly given. The respondent paid the appellant the sum of RM4,712,165.17 being repayment of the 20% discount given to the respondent from January 1990 till December 1990 but refused to make the repayment for the discount given from February 1988 to December 1989 amounting to RM13,127,331.79 which is the claim of the appellant against the respondent in the present appeal. From this it appears that the respondent did not dispute that the discount of 20% was withdrawn but disputed the date when it was withdrawn. In other words the respondent disputed the fact that the withdrawal was effective from February 1988 to December 1989. Thus in its defence the respondent stated that the payments made by it was based on the monthly bills sent by the appellant to the

respondent. The bills included and contained advice of the 30% discount given by the appellant and the 20% discount given by the Kementerian which were in the form of credit notes. Based on those bills where the total discount of 50% had been deducted were shown the respondent paid the bills and the appellant acknowledged receipts of those payments. The respondent in its defence stated that when the appellant accepted the payments of the monthly bills for the period in dispute, the appellant did not raise any objection to the payments or impose any condition. Because of the silence by the appellant in accepting the payments, the respondent was induced to accept the 50% discount given as per advice in the credit notes as valid, unconditional and irrevocable and that the payments made by the respondent in respect of those bills were the full and final settlement of those bills. As such the appellant is estopped from contending that credit notes for the 30% and 20% discounts issued together with the bills were not valid.

It was the contention of the respondent that the letters dated 24 July 1990 and 27 August 1990 from the appellant to the respondent which were exhibited during the trial confirmed that the Kementerian Perdagangan dan Perindustrian and the Kementerian Tenaga, Telekom dan Pos Malaysia had directed the appellant that the 20% discount given to the respondent was to end in January 1990 and not earlier.

The learned judge in his judgment stated that it is the obligation and the legal duty of the appellant to send the correct electricity bills and the 20% credit notes to the respondent. His Lordship went on to say that at all material times the appellant knew that the respondent would rely upon those bills and credit notes to make the payments. His Lordship stated further that those bills and credit notes were signed by authorised officers of the appellant and were properly issued.

The learned judge had the benefits of seeing and hearing the testimonies of the witnesses. His Lordship was of the view that the witnesses did not help the appellant at all since they were not able to show and satisfy the court that respondent prior to 1 January 1990 knew of the withdrawal of the 20% discount given to it. He went on to say that under s. 101 of the Evidence Act 1950, that the onus is on the appellant to prove that they are entitled to the claim. The burden is on the appellant and it is his duty to prove its claim affirmatively. In this respect the learned judge found on the evidence adduced before him the appellant failed to prove its claim.

The learned judge, after perusing all the documents before him, in particular, the letter dated 24 July 1990, found that as a matter of fact that the withdrawal of the 20% discount took effect only from 1 January 1990. In fact the respondent acknowledged this since it is clear from the statement of claim of the appellant that the respondent had made repayment of the 20% discount given to it from 1 January 1990 onwards. The learned judge came to the conclusion that based on this evidence it is clear the withdrawal of the 20% discount by the two Kementerian was effective only from 1 January 1990.

As I have stated earlier this is a finding of fact. Appellant had not shown to us where the learned judge had erred in his finding or that the finding was not supported by or adverse of the evidence before him. As such there is no reason for me to disturb his finding and for that reason alone his decision should be confirmed and the appeal should be dismissed.

As I have mentioned earlier the respondent in its defence also raised the defence of estoppel. In his judgment the learned judge dealt with it. I am of the view that he dealt with it correctly and could not be faulted. In his judgment his Lordship said:

> The notification to the defendant dated 29 August 1990 and 31 May 1991 purporting to withdraw 20% discount already given by monthly credit notes duly signed and authenticated by the plaintiff's authorised officers cannot now be withdrawn retrospectively. The plaintiff had already reconfirmed by their letter dated 24 July 1990 that they had been instructed by MTI to discontinue the 20% discount with effect from 1 January 1990 and therefore it does not lie in the mouth of the plaintiff to now deny and contradict its own letters, documents and discount credit notes. To date the plaintiff has not cancelled any of its discount credit notes and neither has it raised any debit notes/invoice in place of the credit notes. Therefore the 20% discount credit notes given by the plaintiff to the defendant continues to be valid, accurate, binding and irrevocable. In the circumstances, the defence of estoppel succeeds and the plaintiff is estopped form enforcing its claim, ...

I agree with his Lordship in respect of this.

For the above reasons I see no reason to disturb the finding and the conclusion made by the learned judge. The appeal is hereby dismissed with costs.